Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1998

MALHEUR LUMBER COMPANY, et al.,
Petitioners,
and
JEFF BLACKWOOD, et al.,
v.
BLUE MOUNTAINS BIODIVERSITY
PROJECT, et al.,
Respondents.

Appendix to Petition for Writ of Certiorari

VOLUME 2 of 2

(A-63 to A-123)

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Intensity and Significance

When determining whether an action is "significant", the agency must consider the intensity of its impacts. 40 C.F.R. §1508.27(b). In evaluating intensity, the agency should consider the following factors:

"(3) Unique characteristics of the geographic area such as proximity to . . . wild and scenic rivers, or ecologically critical areas.

(4) The degree to which effects . . . are likely to be highly controversial.

(5) The degree to which the possible effects . . . are highly uncertain or involve unique or unknown risks. . . .

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact[39] on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. . . .

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[39]"Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. §1508.7.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." Id.

The agency may consider the extent to which mitigation measures offset adverse effects, however, mitigation measures need not completely compensate for adverse environmental impacts. Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 993 (9th Cir. 1993). The agency must analyze the mitigation measures in detail and explain how effective the measures would be. Northwest Indian Cemetery Protective Ass'n V. Peterson, 795 F.2d 688, 697 (9th Cir. 1986), rev'd on other grounds, Lyng v. Northwest Indian Preservation Ass'n, 485 U.S. 439 (1988). "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." Id. Instead, mitigation measures should be supported by analytical data. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998).

Proximity to Ecologically Critical Area

Plaintiffs argue that: the Big Tower Project may impact the Wild and Scenic portion of the North Fork John Day River which supports the largest spawning populations of wild spring chinook and summer steelhead in the Columbia River Basin, and contains healthy populations of Bull Trout and Redband Trout; the Forest Service's determination that the river will not be effected because no logging will take place within the scenic corridor is insufficient to address the increased erosion and sedimentation caused by the project, which will be deposited in streams which flow directly into the North Fork John Day

River; and the North Fork Drainage is used by Rocky Mountain Elk to migrate to their winter range in the Bridge Creek State Wildlife Area.

The court finds that the Forest Service took a "hard look" at the effects of the Big Tower Project on the North Fork John Day River, and the Forest Service's determination that the Big Tower Project would not significantly affect the wild and scenic qualities of the river was not arbitrary and capricious. The Forest Service does not plan to do any harvesting within the scenic river corridor, and the closest timber harvest is approximately a half mile from the river. Specialty reports considered potential impacts from the project on fish populations in the North Fork John Day River. The EA adopted mitigation measures, based on these specialty reports, that are designed to minimize significant impacts on water quality, fish and fish habitat. (AR 1172, 1308-1309, 1547, 1561, 1828, 1846).

The EA has done more than merely list mitigation measures. The mitigation measures contained in the EA are based on specialty reports and BMPs. The Fisheries and Aquatic Species report developed its mitigation measures in consideration of PACFISH, TFEA, the Forest Plan, BMPS, previous mitigation measures used in the Texas EA, and direct observations of the conditions in the project area. The water resources report determined that the project would not reduce stream surface shade or increase stream water temperatures. This report recognized that the North Fork John Day River and Cable Creek were water quality impaired for temperature, and determined that water temperatures were expected to decrease at a faster rate because of revegetation within RHCAs.

Oregon and Washington compared the Forest Service's BMPs with state BMPS, which have been certified by the EPA, and found that the Forest Service's BMPs met or exceeded state requirements. Under Oregon law, an operator who complies with state approved BMPs "shall not be considered in violation of any water quality standards". ORS 527.770. The state approved BMPs set out in the EA contain information on location, effects, and consequences of the use of BMPs. The BMPs are designed to maintain water quality, reduce detrimental impacts on soil, riparian areas, sensitive plants, and downstream water sources, prevent and control erosion and sediment movement, reduce erosion and compaction, minimize erosion and compaction from skid trails, and prevent or reduce detrimental impacts from roads.

The court finds that the Forest Service took a "hard look" at the presence of the Bridge Creek State Wildlife Area and its importance as winter range for elk, and the Forest Service's determination that the Big Tower Project would not significantly effect ecologically critical areas was not arbitrary and capricious. The Wildlife Resource Analysis (AR 1394-1412) acknowledges that Bridge Creek State Wildlife Area is adjacent to the Big Tower Project Area, and that it is an important area for winter range used by elk. The analysis states that the Tower Fire was located in an area that was meeting elk and deer overall population objectives. The analysis relied upon telemetry from ODF&W, which indicated that there was little movement of elk through the Tower Fire analysis area. The analysis finds that: implementation of BMPs, Forest Plan Standards and Guidelines, and incorporation of up to date research will mitigate and reduce potentially significant effects; the proposed salvage harvest will not alter habitat in a way to

effect wildlife populations in and around the analysis area; disturbances to Rocky Mountain elk will not be measurably greater under Alternative 2 than Alternative 1, and the designation of PACFISH RHCAs and implementing snag requirements will help maintain some of the remaining screening cover and habitat connectivity for elk; disturbances to elk from harvest activities are expected to result in temporary displacement of elk during hunting season, but the disturbance are not expected to be markedly different from Alternative 1, since the majority of the harvesting would take place during the normal operating season; concerns regarding habitat connectivity were addressed to some degree through eliminating areas within the Oriental and Texas Bar creek drainages with sensitive soils and high erosion potential, and the designation of PACFISH RHCAs and implementing snag retainment requirements as partial mitigation measures. Plaintiffs have not cited to evidence in the record that demonstrates that the Big Tower Project will significantly effect the Bridge Creek State Wildlife Area.

Highly Controversial

Plaintiffs argue that the effects from the Forest Services' use of tractor logging, entering PACFISH buffers, reducing wildlife cover below minimum Forest Plan standards, and construction of logging roads are highly controversial. Plaintiffs also argue that the Big Tower EA fails to: inform the public of the scientific and widespread support for the position that tractor logging is not the best approach after a wildfire; discuss the findings and conclusion of the Beschta Report; and explain in the Big Tower Project Notice of Decision and FONSI why its chosen scientific approach is not highly uncertain or will involve effects that

are not highly controversial[40]; and address why comments received from ODF&W, the Confederated Tribes of the Umatilla Indian Reservation, eleven conservation organizations, expert testimony from hydrologist Jon Rhodes, and the Big Tower project EA, do not demonstrate that the effects of the project are highly controversial. Federal defendants argue that opposition to the project and difference in scientific opinion do not equate to substantial controversy, and the Forest Service addressed the Beschta report in the Everett report.

"The existence of public controversy over the effect of an agency action is one factor in determining whether the agency should prepare [an EIS]. A federal action is controversial if a substantial dispute exists as to its size, nature, or effect." Greenpeace Action, 14 F.3d at 1333 (citations and quotations omitted). Controversy does not refer to public opposition to the project. Northwest Environmental Defense Center v. Bonneville Power Admin., 117 F.3d 1520, 1536 (9th Cir. 1997). "[A]n EIS is not required when an agency makes a good faith effort to satisfy the concerns of commentators, and, to at least some extent, succeeds." Surfrider Foundation v. Dalton, 989 F.Supp. 1309, 1323 (S.D. Cal. 1998).

The court finds that the Forest Service took a hard look at the controversial nature of the effects of the Big Tower Project, and its conclusion that there was not a

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[40] The Forest Service's failure to follow the Regional Forest Service Director's letter is not subject to judicial review. See Western Radio Servs. Co. v. Espy, 79 F.3d 896, 900 (9th Cir. 1996), cert. denied, _ U.S. _, 117 S.Ct. 80 (1997).

substantial controversy was not arbitrary and capricious. The record contains evidence that the Beschta report was considered in the Everett report. It also appears that the Forest Service followed many of the recommendations in the Everett report, rather than recommendations contained in the Beschta report. The record shows that some of the concerns in the Beschta report, as well as the concerns of ODF&W, and the Confederated tribes were taken into consideration, and the Big Tower Project responded to those concerns.

Forest Service soil scientists reviewed salvage units in the field to determine their suitability for tractor logging. Many of the units had suitable slopes from an erosion standpoint, and it was determined that tractor logging could proceed without unacceptable risk. Other units were dropped or changed to helicopter or skyline logging. (AR 2036).

The EA uses helicopter logging in 1/4 of the area, and no new permanent roads will be constructed. The temporary roads will be built to minimize impacts, and will be obliterated. (AR 984, 997, 1291, 1309) The Forest service will use BMPs to minimize erosion. (AR 997, 1317). Upgrading roads is expected to minimize erosion. (AR 1323). Mitigation measures were designed to avoid adverse impacts on fish and fish habitat. (AR 1177-1178, 1308-1309, 1547-1549). In addition, no logging will take place in RHCAs.

Effects are Uncertain and Involve Unknown Risks

Plaintiffs argue that the potential effects from the project on erosion and sediment delivery are uncertain and involve unknown risks, as evidenced in the TFEA and the

Beschta report; the Forest Service has insufficient information on the effects of erosion from logging burned areas to determine the effects of the Big Tower Project on erosion and sedimentation; and the Forest Service's decision was not fully informed or well-considered. Federal defendants argue that: the Forest Service evaluated the erosion potential in the TFEA based on the Soil Resource Inventory map units and the Burn Intensity Map; the initial units proposed for tractor logging were reviewed by Forest Service soil scientists for erosion potential, and the sites were modified accordingly; past experience logging unburned areas, with similar soil types, showed that large increases in erosion did not occur when BMPs were implemented; the court should defer to the Forest Service's determinations because they involve forecasting in an area where its technical expertise is involved; the Forest Service does not have to employ the best scientific methods; and the Forest Service properly relied on the opinions of its own experts.

An agency must indicate the extent to which environmental effects are uncertain or unknown. Citizens Against Toxic Sprays, Inc. V. Bergland, 428 F.Supp. 908, 922 (D.Oregon 1977). In addition, an agency must address the uncertainties surrounding scientific evidence in a meaningful way. Seattle Audubon Soc. v. Espy, 998 F.2d 699, 704 (9th Cir. 1993). If the court is satisfied that an agency's "exercise of discretion is truly informed, the court must defer to 'th[at] informed discretion.' " Greenpeace Action, 14 F.3d at 377. (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)).

The court finds that the Forest Service took a hard look at the possibility of uncertain effects of erosion and

sedimentation associated with the salvage logging component of the Big Tower Project. The TFEA states that sedimentation data was not readily available. The Forest Service attempted to measure post-fire erosion by putting boxes in Winom Creek and several smaller tributaries, but the sediment amount was too great to maintain the boxes. The box in Winom Creek filled in a month and others were buried and lost. The TFEA analysis recognized that more comprehensive analysis and interpretation was needed to understand sediment relationships in and downstream of the fire area. (AR 2521).

The Forest Service estimated erosion potential using the Soil Resource Inventory Map and the Burn Intensity Map. (AR 2514). The TFEA states that experience with other fires in the area has shown that, in the absence of extreme climatic events, large-scale erosion should be limited, but it recognizes that the risk of erosion is "quite real". (Id.).

The EA recognizes that timber harvesting is expected to increase erosion, but it also states that past observations of logging unburned areas with these soil types has shown that large increases in erosion do not occur when BMPs are implemented. The Forest Service consulted with the Wenatchee National Forest, which experienced wildfires in 1994, regarding post-fire recovery issues. (AR 839-865). In its appeals decision, the Forest service recognizes that there are differing scientific opinion regarding the effects of post-fire logging. It states that, in addition to consulting with officials from the Wenatchee National Forest on this issue, they also reviewed results from past fires on the North Fork John Day Ranger District and the Wheeler Point Fire Salvage. (AR 1840).

The record contains evidence that the Bescnta report was considered in the Everett report. The Everett report: recognizes that the Beschta report calls for minimal post-fire management, which is a specific viewpoint which should be considered, along with other views from other resource scientists; opines that the Beschta report is biased towards hands-off management; recognizes that much of the scientific information can be conflicting because conditions vary from site to site; points out that other scientists believe that intensive science-based management is more appropriate; discusses the need to seed introduce species on steep slopes following fires to prevent soil erosion; states that there is conflicting information on the subject of post-fire management; discusses soil stability, and finds that letting nature take its course may not be the best post-fire management approach; refers to other scientific literature containing examples of increased soil erosion following salvage logging and accompanying road construction; calls for land managers to balance the costs to salvage timber against the potential costs associated with environmental harms; points out that the Beschta report focuses on the exclusion of salvage logging from sensitive areas as a prelimnary guide; and criticizes the Beschta report's "broad brush approach" of prohibiting logging on sensitive sites; and states that salvage logging should be used as a management tool to achieve biological goals. (AR 577).

Forest Service soil scientists reviewed salvage units in the field to determine their suitability for tractor logging. Many of the units had suitable slopes from an erosion standpoint, and it was determined that tractor logging could proceed without unacceptable risk. Other units were dropped or changed to helicopter or skyline logging. (AR 2036). The

Forest service will use BMPs to minimize erosion. (AR 997, 1317). Upgrading roads is expected to minimize erosion. (AR 1323).

Cumulatively Significant Impacts

Plaintiffs argue that: the Big Tower Project, the Hairy Hazard Tree Project, the Tower Project, the South Tower Project, and the Camas Sale will have significantly cumulative impacts in the form of erosion and sedimentation, which will impact fish habitat and populations and water quality standards, and a decrease in wildlife cover levels; the Forest Service failed to account for the impacts of logging on private lands adjacent to the Tower Fire on fish and wildlife; the Forest Service's evaluation and analysis of the effects of past logging is inadequate; the EA fails to discuss the Turner Otter Salvage Sale; the EA fails to address impacts on wildlife habitat, soil erosion, and sedimentation from the Camas Sale, the Bull Fire, and the Summit Fire; the cumulative impacts analysis for sedimentation and erosion does not disclose past, on going, and reasonably foreseeable actions; the Big Tower EA does not contain any quantified or detailed information or estimates regarding the potential for soil erosion or sedimentation; and the Big Tower Project does not provide a detailed analysis of the potential impacts on wildlife.

Federal defendants argue that: the Big Tower Project EA was based on the Burned Area Report, the specialty reports, and the interdisciplinary team TFEA, and these reports, which took into account the cumulative effects of past, ongoing, and reasonably foreseeable future actions, including the five projects listed by plaintiffs, were available

for review; the Big Tower Project considered the actions taken under the Burned Area Report, the Hairy Hazard project, and the South Tower project; the TFEA was followed in designing the Big Tower Project; the Big Tower Project has been designed and modified to avoid significant adverse impacts on the environment; the Big Tower EA discloses the effects of the proposed logging (AR 1320-1323); the administrative record discusses the Tower Fire, Burned Area Report projects, past timber harvests, existing ORV trails, existing roads, past grazing, the North Fork John Day Dredge Tailings Restoration project, the 96 Roadside Salvage, and the temporary road construction and timber harvest associated with the Big tower project (AR 1317-1318); the TFEA discloses locations of past harvests (AR 2527-2528); sediment associated with the 96 Roadside Salvage and the drege trailing reclamation was discussed in the Soil Productivity/Erosion/Sedimentation section of the Big Tower EA, as were road densities (AR 1318); cumulative impacts on fish populations and habitat were disclosed in the Big Tower Project EA (1322-1323); and the Big Tower EA provides specific information on how the effects on wildlife habitat will be mitigated under Alternative 1's discussion (AR 1329).

Defendant/Intervenors argue that: the Forest Service has adequately addressed cumulative effects of past, present, and reasonably foreseeable future actions by incorporating the TFEA, which encompassed the entire burned area, in the Big Tower EA; the Big Tower EA states that a larger area encompassing the associated subwatersheds was used to analyze the effects on fish, wildlife, and soil resources; this analysis includes information on Cable Creek; when the decision for the Big Tower Project was signed, the South Tower Project was still in the planning stage, and therefore,

its effects did not have to be considered; the effects of the Big Tower Project can be considered in the South Tower project; the environmental analysis for the Camas project was supplemented based on the Big Tower project; since only one percent of the Camas restoration EA project occurs within the Tower Fire Area, the Forest Service properly concluded that it would have minimal effects when combined with the Big Tower project; the Big Tower project EA accounted for the conditions in the Camas watershed in the TFEA; the Forest Service conceded the possibility of additional erosion, but the erosion would be minor when compared to the erosion created by the Big Tower Fire because no new permanent roads will be constructed and temporary roads will be located away from streams; the Forest Service evaluated each tractor harvest unit on highly erosive soils to confirm that slopes were stable enough to support tractor logging, to confirm that unit boundaries avoided high risk areas, and units were modified or eliminated if problems were found (AR 2036); a Forest Soil Scientist visited the tractor units and concurred with the location and modifications of the harvest boundaries (AR 2036, 1551-1552); there would be no significant harm to the bull trout because before the fire, bull trout were absent from the creeks draining the harvest units and the fire killed the fish in these creeks (AR 1173-1174); fish are expected to repopulate the creeks, and mitigation measures are designed to minimize sedimentation (AR 1174-1175, 1437-1441); no harvesting will occur within at least 150 feet of Class I streams (AR 1305); live trees, snags, and wildlife trees will be retained to meet 100% of the cavity nesting wildlife population potential (AR 1308-1309); the Big Tower Project is located in an area where timber harvest is permitted by the Umatilla Forest Plan; the Big Tower Project does not exceed the Plan's permitted level of timber harvest; the Big Tower

Project conforms to the Plan and its EIS; the Plan includes salvage timber as part of its normal sales program; the Plan ackonowledges the risks of catostrophic wildfires; the Tower Fire Salvage and the Hairy Hazard Salvage were small projects with no environmental impacts that were categorically excluded from NEPA; and the Big Tower Project EA contains many mitigation measures for both wildlife and water quality which support a conclusion of nonsignificance (AR 79-167, 1153-1158, 1291, 1308-1309, 1438-1439, 1473).

The court finds that the Forest Service took a "hard look" at the possibility of cumulative impacts from the Big Tower project, and its decision that the Big Tower Project would not cause significantly cumulative impacts was not arbitrary and capricious.[41]

The EA discusses current soil productivity, erosion, and sedimentation, as well as, expected cumulative effects from the Big Tower Project. The EA recognizes that past timber harvests and the Tower Fire have reduced coarse woody debris in the analysis area. (AR 1317). To prevent further reductions, timber salvage would be limited to areas which were less intensively harvested in the past. (Id.). The EA also discusses the cumulative effects of past timber harvests, existing roads and trails, and past grazing on soil erosion. (AR 1318). The EA discusses the cumulative effects of the Roadside sale and future ground-based harvests. (Id.). The EA discusses impacts from past livestock grazing, and plans to prohibit grazing for two years in high mortality

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[41]Issue regarding water quality are discussed in the section regarding potential violations of Oregon's water quality standards.

areas. (Id.). The EA also discusses additional sedimentation from the North Fork John Day Dredge Tailings Restoration Project. (Id.).

The EA contains information on the existing conditions for Fisheries habitat and water quality. (AR 1320). It discusses the cumulative effects of the Big Tower project on these resources. (AR 1322). The EA finds that future road rehabilitation and obliteration projects will reduce road sedimentation effects. (AR 1323). It also recognizes that additional sedimentation is expected from the Roadside Sale, the dredge reclamation project, and livestock grazing and timber management on private lands. (Id.). The EA sets out mitigation measures, based on specialty reports and BMPs, to minimize erosion, sedimentation, and negative effects on wildlife habitat.

The record contains the TFEA, which addressed issues of soil productivity, including potential for erosion, fisheries resources, habitat restoration, fuel loading, salvage, and water quality. (AR 2474-2621). The TFEA contains an estimate of erosion potential using SRI interpretations for surface erosion potential in combination with the Burn Intensity map. (AR 2514). The Forest Service installed bedload boxes on Winom Creek and several smaller tributaries, but found sediment production too great to maintain the boxes. (AR 2521).

The record contains a biological evaluation for proposed, endangered, threatened, and sensitive wildlife species and habitats. (AR 1447). The analysis area covered both National Forest and private lands. (Id.). The analysis describes effect of the Tower Fire on the area. (Id.). The

evaluation assessed the effects of the project on California wolverines, North American Lynx, Northern Bald Eagle, Preble's Shrew, and Townsend's Big-eared bat. (AR 1449). The cumulative effects analysis was based on a 20 year time period before and after the proposed project. (AR 1452). It recognized that past activities, including National Forest and private timber management and associated roads, fragmented and reduced habitat. It listed past timber sales which fragmented habitat in Oriental and Texas Bar creeks. It discussed that those harvests did not provide adequate riparian buffers. The report found that the Big Tower project would have low level effects on habitat compared to the effects of the Tower Fire, and that these effects would be reduced through the designation of leave snags, CWD, and PACFISH RHCAS. The report also found that BMPs and Forest Plan Standards and Guidelines will be implemented so that potentially significant effects would be mitigated and reduced to non-significant levels. (Id.). The report recognized ongoing activities that would add to loss of habitat and disturbances, and found that long-term adverse effects were not expected. The report also took into consideration effects from the Roadside sale, the South Tower project, The Turner/Otter Larch resale, grazing on private and forest service lands, thinning on forest service and private lands, and fire salvage in roadless areas. (AR 1453). The report found that implementation of BMPs and Forest Plan standards and Guidelines would mitigate potentially significant impacts to non-significant levels. (Id.).

The Big Tower EA contains a biological evaluation for aquatic species. (AR 1547). This evaluation finds that the Big Tower Project Alternative 2 is not likely to jeopardize the continued existence or result in destruction or adverse

modification of proposed critical habitat of the Bull Trout. The evaluation recognizes that Bull Trout do not occur in the streams of the project area, but do occur in downstream in the North Fork John Day River seasonally. The evaluation finds that effects of the project would likely be limited to a potential minor reduction in prey base since spawning and juvenile rearing does not occur in these reaches. The evaluation states that alternative 2 may impact individuals or habitat of Redband Trout, Steelhead Trout, and Spring Chinook, but the project is not likely to contribute to a trend toward federal listing or cause a loss of viability to the populations or species. The evaluation recognizes that Spring Chinook do not occur in the project area, but occur in downstream, reaches of Oriental Creek and the North Fork John Day River. The evaluation states that default PACFISH RHCAs would be established, PACFISH standards for timber management would be met, and increased RHCA dimensions in high risk areas and prohibitions of skid trails and roads within RHCAs, as well as other mitigation measures contained in the EA, will provide additional protection.

The Fisheries and Aquatic Species report describes the affected environment and the effects of the EA alternatives on fish and aquatic species and their habitats. (AR 1172). It assessed the current condition of fish species, including the presence of steelhead, rainbow trout, chinook salmon, bull trout, and other fish in the North Fork John Day River. (AR 1173). It recognizes that the John Day River may be subject to downstream effects on water temperature and sediment from Texas Bar and Oriental Creeks. (Id). It also recognizes that Texas Bar and Oriental Creeks have been extensively roaded and harvested. The report recognizes that

Cable Creek was listed as a 303d stream due to habitat modification and summer temperature.

The report states that: the expected increase from erosion and sedimentation from Alternative 2 is not high, but there was some increased risk from alternative 2 in tractor units and skyline units where timber harvest would occur in the RHCAs; any increase in erosion and sedimentation from timber harvest would be in addition to the cumulative effects of the fire and existing roads in the area; road densities, not including existing old roads and skid trails that are not part of the current transportation systems, in Oriental and Texas Bar Creeks was already high; adverse impacts from some roads were identified in previous projects; increases from sediment from roads is more chronic and prolonged, with greater long-term effects on fish; additional road rehabilitation and obliteration projects would reduce long-term effects; a small amount of sediment would be produced from the roadside hazard tree removal and drege tailing reclamation in the North Fork John Day; some impacts from grazing on private lands in Texas Bar and Cable Creeks is expected; and no difference in stream temperature were expected under any of the alternatives.

The report developed mitigation measures "in consideration of PACFISH, the TFEA, the Forest Plan, previous mitigation measures in the Texas EA related to timber harvest in much the same project area, and direct observation of conditions in the project area". The mitigation measures included: RHCA dimensions of 300 feet on each side of Class 1 and 2 fish-bearing streams, 150 feet on each side of Class 3 streams, and 50 feet on Class 4 streams; no skid trails within RHCAs; no new road construction within

300 feet of class 1-3 streams or within 100 feet of class 4 streams; directional felling of trees from outer 150 feet of 300 feet RHCAs; 100 foot no cut buffer for springs, seeps, and wet areas of less than 1 acre; 150 foot no cut buffer for springs, seeps, and wet areas of more than 1 acre; any trees cut in RHCAs to be left on site; no skidding in swales; directionally fell trees out of swales; leave slash and cut materials scattered in swales; implement BMPs; and prevent livestock grazing in moderate and high intensity burn areas for a minimum of 2 years to reduce cumulative effects. These mitigation measures are included in the Big Tower EA. (AR 1308-1309).

At the time of the decision, the Forest Supervisor decided, as a mitigation measure, that harvest could only occur in the outer 50 percent if a fish biologist or hydrologist could determine that resource risks were low enough. (AR 1561). The decision was mitigated again so that no harvest in PACFISH buffer zones was allowed. (AR 1828, 1846).

The Wildlife Resource Analysis (AR 1394-1412) contains mitigation measures that are common to all the alternatives. (AR 1395). The report describes the general status of wildlife habitat after the fire. (AR 1396). It discusses MIS, old growth habitat, other species, special habitats, and TES, and the environmental consequences of the proposed alternatives. (AR 1397-1410). The report states that: loss of cover quantity and quality, caused by drought, insect infestations, and past timber management practices, have fragmented migration routes through the Oriental Basin and Texas Bar Creek; post-fire conditions will favor the Rocky Mountain elk; both summer and winter foraging habitat for the elk is expected to improve because of the fire;

the Tower Fire caused loss of screening and thermal cover, but snags would provide low level screening cover; wildlife disturbances and displacements are expected to increase due to the more open conditions created by the fire and increased human activity in the burned area; and elk calving was very limited in the analysis area. The analysis discusses direct, indirect, and cumulative impacts within the Tower Fire analysis area. The Wildlife analysis used a 20 year time period in determining potential effects from salvage harvesting and reasonably foreseeable future projects. The analysis acknowledges that salvage harvesting would reduce wildlife habitat by removing snags, but it also states that artificial reforestation will initiate the recovery process of long term cover more quickly than the no action alternative.

The cumulative effects analysis examined past timber practices and associated roads on both private and Forest Service lands, and found that cover and foraging resources would be reduced in the short term. It acknowledges that Alternative 2 will provide residual snags and CWD for wildlife, and will provide compensation through artificial reforestation, which will initiate the recovery process quicker and provide for long term cover. The study discusses other activities on private and National Forest lands, and states that long term adverse effects and reductions in species viabilities are not expected. The analysis discusses reasonably foreseeable actions, including the Roadside Project, the South Tower project, thinning, grazing, the Turner Otter Salvage Sale, reforestation, underburning, and potential fire salvage in the roadless area. The analysis finds that the effects of the actions will be time specific and more pronounced early in the recovery process, and will decrease over time. The analysis finds that implementation of BMPs, Forest Plan

Standards and Guidelines, and incorporation of up to date research will mitigate and reduce potentially significant effects. The analysis finds that the proposed salvage harvest will not alter habitat in a way to effect wildlife populations in and around the analysis area. It states that seasonal road and OHV trails restrictions may need to be implemented if found warranted.

The analysis finds that disturbances to Rocky Mountain elk will not be measurably greater under Alternative 2 than Alternative 1, and the designation of PACFISH RHCAs and implementing snag requirements will help maintain some of the remaining screening cover and habitat connectivity for elk. Disturbances to elk from harvest activities are expected to result in temporary displacement of elk during hunting season, but the disturbance are not expected to be markedly different from Alternative 1, since the majority of the harvesting would take place during the normal operating season. The analysis states that concerns regarding habitat connectivity were addressed to some degree through eliminating areas within the Oriental and Texas Bar creek drainages with sensitive soils and high erosion potential, and the designation of PACFISH RHCAs and implementing snag retainment requirements as partial mitigation measures.

Threatened Violation of Other Environmental Laws

Plaintiffs argue that: the EA must contain sufficient data and facts to demonstrate compliance with Oregon's antidegradation policy; to comply with Oregon's antidegradation policy and to meet NEPA requirements, the EA must contain a discussion and analysis of the

antidegradation policy; the EA does not demonstrate compliance with Oregon's antidegradation policy because it fails to analyze or consider whether sediment is related directly or indirectly to causing Cable Creek to be water quality limited for temperature and fish habitat modification or causing the North Fork John Day River to water quality limited for temperature; the Forest Service has failed to develop a water temperature management plan for Cable Creek or the North Fork John Day River; the EA fails to address the turbidity standard for the John Day Basin; the EA fails to disclose the potential number or location of stream crossings, and to analyze and disclose the effects of these crossings; compliance with BMPs does not automatically ensure that applicable state standards are being met; and the decision lacks hard data on sedimentation and erosion to support the conclusion that the Big Tower Project will produce considerably less sediment than the Tower Fire. Federal defendants argue that: the record shows the Big Tower Project will comply with Oregon water quality standards (AR 1567); the issue of water quality was assessed in the water resources report preceding the EA (AR 990-991); BMPs were developed for the Big Tower Project (AR 1153-1158); water quality was assessed in the EA (AR 1297, 1320-1323, 1336); water quality was a key issue in the EA (AR 1560, 1563); compliance with water quality standards was an issue on appeal, and the appeals officer upheld the decision (AR 1826, 1849); proper compliance with state-approved BMPs constitutes compliance with the CWA; the court cannot assume the Forest Service will violate the law; and only monitoring after the fact can establish a violation of water quality standards. Defendant/Intervenors argue that: the Big Tower Project will help water quality gradually recover by planting trees, repairing roads, and removing dead

trees that could reburn at high intensity in a subsequent fire; the Big Tower Project is fully consistent with Oregon's regulatory scheme for forest practices and protection of water quality; the Big Tower Project adopts BMPs that meet or exceed the BMPs of the state forest practice rules; the Forest Service has prepared a comprehensive ecosystem/watershed analysis for the watersheds in the Big Tower area; and a water temperature management plan is not required because the Forest Service is using BMPs, and, by doing so, under ORS 537.770, their actions do not violate state water quality standards.

The CWA requires the Forest Service to comply with state water quality standards, including a state's antidegradation policy. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1153 (9th Cir. 1998); Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 848 (9th Cir. 1987). "Proper implementation of state-approved BMPs will constitute compliance with the Clean Water Act unless water quality monitoring reveals that the BMPs have permitted violation of these water quality standards." Oregon Natural Resources Council v. Lyng, 882 F.2d 1417, 1424 (9th Cir. 1989), amended, 899 F.2d 1565 (9th Cir. 1990); ORS 537.770. Oregon and Washington compared the Forest Service's BMPs with state BMPS, which have been certified by the EPA, and found that the Forest Service's BMPs met or exceeded state requirements. Since the Forest Service is using state approved BMPs for the Big Tower Project, the Forest Service is deemed to be in compliance with state water quality standards, including the antidegradation policy, unless and until monitoring reveals otherwise.

Temperature management plans are governed by a Memorandum of Understanding between the Forest Service and Oregon's Department of Environmental Quality. OAR 340-41-120(11)(e)(A). Under Oregon's administrative rules, BMPs constitute the surface water temperature management plan for activities covered under the Forest Practices Act. Id. The Forest Service is using BMPs for the Big Tower Project, and these BMPs constitute the temperature management plan for the project.

The court finds that the Forest Service took a hard look at whether the Big Tower project threatens to violate water quality laws, and the Forest Service's determination that the Big Tower Project does not threaten to violate these regulations was not arbitrary and capricious. The Forest Service: assessed water quality issues in the water resources report preceding the EA (AR 990-991); assessed water quality in the EA (AR 1297, 1320-1323, 1336); analyzed stream temperature monitoring information, conditions affecting stream temperature, measures to prevent increases in stream temperature, and measures to lower stream temperature (AR 1000, 2520-2522, 3080); recognized that a more comprehensive analysis and interpretation is to understand sediment relationships in and downstream from the Tower Fire area (2520-2523); recognized that sedimentation could exacerbate temperature increases, and that both Cable Creek and the North Fork John Day River were water quality impaired (AR 3080, 1298, 1322, 1560); developed, adopted, and modified mitigation measures to prevent sedimentation and temperature increases (AR 997, 1000, 1116-1120, 1153-1158, 1291, 1308-1309, 1438-1439, 79-167, 485, 1869, 3080, 1437); anticipated that the amount of sediment produced from the Big Tower project would be

small compared to the amount of sediment produced by the Tower Fire (AR 1317, 1562); attempted to measure the amount of sediment produced by the Tower Fire by placing boxes in Winom Creek and other streams; performed on site evaluations with regard to mitigation measures (AR 1116-1120); plans to reduce stream temperatures through riparian revegetation (AR 1000); performed a field inventory of riparian habitat, woody debris, pool depth, and stream cover (AR 2356, 3082); performed the TFEA which assessed water quality, including temperature (AR 2520-2523); and discussed compliance with the CWA (AR 1336).

This case is clearly distinguishable from Sierra Club v. U.S. Forest Service, 843 F.2d 190 (9th Cir. 1988). In that case, the EA did not mention the impact logging would have on state water quality standards, and there was evidence, in the form of expert opinion, that previous logging in the area had created sufficient turbidity to violate state water quality standards. Id. at 1195. In our case, it is clear that the Forest Service recognized and addressed the issues of temperature and the anticipated effects of sedimentation on stream temperature.

This case is also distinguishable from Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998). In Idaho Sporting Congress, the Forest Service relied upon an expert hydrologists opinion, which in turn was based upon his review of the topography of the area and an out-dated study of a different watershed, in determining that the proposed timber sale would not have a significant effect on water quality and that mitigation measures would prevent such effects. Id. at 1150-1151. In our case, the Big Tower Project does not merely contain a list of mitigation measures

that are unsupported by analysis and data. The mitigation measures and BMPs contained in the EA are based on recent specialty reports in the Tower Fire Analysis area and Forest Service Region 6 BMPs, which were reviewed and approved by the state of Oregon. The Forest Service will conduct monitoring, including water temperature monitoring to ensure that the BMPs are properly implemented. Under Oregon law, the use of BMPs constitutes compliance with state water quality standards, including the state's antidegradation policy.

The specialty reports were based on analysis in the field and other expert opinions and studies. For example, the Fisheries and Aquatic Species report developed its mitigation measures in consideration of PACFISH, TFEA, the Forest Plan, BMPS, previous mitigation measures used in the Texas EA, and direct observations of the conditions in the project area. This is not a case where the Forest Service is relying on out-dated information on a different area or mitigation measures that are not supported by analytical data in making their determinations.

This case is distinguishable from Northwest Indian Cemetery v. Peterson, 795 F.2d 688 (9th Cir. 1986). In that case, the court found that the Forest Service had ignored and failed to disclose the risks to water quality from landslides, and there was no indication that BMPs were to be considered state water quality standards. Id. at 697. In this case, the state has recognized that compliance with state approved BMPs constitutes compliance with state water quality standards. In addition, the Forest Service did not ignore or fail to address the issues of sedimentation and water temperature.

Substantial Questions

Plaintiffs argue that: the EA's discussion and analysis of existing conditions and potential impacts on fish habitat and water quality is inadequate; the EA fails to disclose information regarding the extent and magnitude of past management activities such as the volume of past logging, the actual miles of logging roads, the number of stream crossings by roads, the extent of riparian vegetation loss due to grazing, road construction, and logging; the EA fails to discuss the effects of the Tower Fire, including failure to estimate or predict the likely magnitude of erosion and sediment delivery caused by the fire; the EA fails to disclose the proposed location of logging roads; EA fails to disclose the number and location of roads which will cross streams; EA fails to disclose the number and location of helicopter landings; the EA fails to disclose the perennial streams in which logging will occur inside the recommended PACFISH buffers; the EA fails to disclose the magnitude of the created openings which would result from proposed logging; no data, information, or evidence is provided to explain the effectiveness of mitigation measures or BMPs; no evidence is provided to show BMPs can reduce the impacts of logging, grazing, and road construction at the watershed scale to an ecologically insignificant level; the project would result in further reduction in wildlife habitat through the removal of large diameter trees, snags, and downed material; wildlife screening cover will be reduced; snag levels will be reduced below the levels recommend in the TFEA and PACFISH guidelines; and cover and forage resources will fall below minimum levels required in the Forest Plan.

Federal defendants argue that: this argument is redundant of earlier arguments; the proximity and size of the project are not determinative on the issue of significance; adverse effects from the Big Tower Project have been avoided or minimized; the record shows miles of specific road construction (AR 1291, 1303) and the number of acres proposed for harvest by logging system; logging system specialists developed tentative harvest and transportation plans for the harvest units, which were made available to the interdisciplinary team for use in their analysis and effects reports (AR 866-870, 2227-2291, 1010-1015); relevant facts associated with the logging systems are documented in the Big Tower Logging Feasibility Report (AR 1890-2056); the information contained in the feasibility report was used to describe the effects of the alternatives on soil productivity, erosion, and sedimentation (AR 1314-1319); plaintiffs have failed to cite any authority for the proposition that an EA must contain exact locations of landings and roads; Big Tower Project will comply with water quality standards; Big Tower Project will not affect stream shade, and thus will not affect water temperatures (AR 1174-1175, 1828, 1846); the Big Tower Project is designed to avoid adverse impacts on fish and wildlife (AR 1312-1337, 1177-1178, 1547-1549); Big Tower Project will fully comply with PACFISH (AR 1846, 1828); the Vegetation Report in the TFEA shows the location of established plantation within the Tower Fire, which closely correspond to openings created, and, because of extensive mortality caused by the Tower Fire, a more detailed analysis of created openings was not completed (AR 2689, 2665, 1829); cover for wildlife will be retained in PACFISH RHCAs (AR 1330); snag levels are based on the Forest Plan as amended by the Eastside Screens, and have been adapted to meet habitat conditions following a wildfire

(AR 1308-1309, 524-559, 884-891); snags levels would maintain 100% population potential for woodpeckers and other MIS (AR 1329); pileated woodpeckers and certain other cavity dwellers are not expected to occupy blackened stands (AR 1397, 1403); unmerchantable trees will be left behind to provide additional short-term cover (AR 1330); and screening cover will also be supplied through additional mitigation measures contained in the TFEA and the EA (AR 2652-2656, 1329-1330, 1291, 1313).

As pointed out by defendants, plaintiffs arguments repeat many of their earlier points which have been addressed. The court finds that the Forest Service took a "hard look" at the issue raised by plaintiffs. The TFEA assessed impacts on fish habitat, soil condition, and watershed conditions. (AR 2481, 2514, 2517, 2519, 2521, 2522). The EA also contains information on water quality. (AR 982, 990-991, 997, 1004, 1172-1179, 1297, 1314, 1320-1323, 1336). Before the Forest Service prepared the EA, surveys of the burned area were conducted to assess forest vegetation (AR 2292), trails (AR 2333, range (AR 2336), fish (AR 2356), soils (AR 2368), and sensitive species (AR 2469). The Forest Service used SRI to estimate sediment and erosion. (AR 2514). The Forest Service examined issues of water temperature (AR 1174-1175, 1828, 1846). Mitigation measures were developed to avoid adverse impacts to fish and wildlife. (AR 1312-1337, 1177-1178, 1547-1549). The Big Tower Project will upgrade roads to help eliminate sediment. (AR 1177, 998, 1291, 1323). The Forest Service will use state approved BMPs to minimize erosion and maintain water quality standards. (AR 997, 1317). The record contains extensive information on logging, including miles of specified logging road construction, the number of

acres to be harvested by logging system, tentative harvest and transportation plans, and a logging feasibility report. (AR 866-870, 1303, 1311, 2227-2291, 1890-2056). The Big Tower Project will comply with PACFISH buffers. (AR 1828, 1846). The Forest Service has presented evidence that, due to the magnitude of mortality caused by the Tower Fire, further analysis regarding created openings was deemed unnecessary. (AR 2665, 2689).

The Big Tower Project contains plans for reforestation of 8700 acres which will expedite the return of wildlife cover. (AR 131, 1329-1330). Wildlife cover will be retained in PACFISH RHCAs. (AR 1330). The snags levels in the Big Tower Project will meet amended Forest Plan standards. (AR 524-559, 884-891, 1308-1309). The Forest Service plans to leave unmercantable timber on site to provide short-term cover. (AR 1330). The Forest Service will implement other mitigation measures as well. (AR 2652-2656, 1329-1330, 1313).

Range of Alternatives

Federal defendants argue that: the Forest Service considered a full range of alternatives as required by NEPA - the no action alternative, two action alternatives, and four alternatives that were not considered in detail; and restoration alternative advocated for by plaintiffs was not an appropriate alternative because it would not accomplish one of the goals of the project - salvage logging. Defendant/Intervenors argue that: the Big Tower Project EA contained an adequate range of alternatives by considering seven alternatives, including implementing restoration activities only (AR 1302-1303); the restoration activities only option was considered, but not fully

developed; and the three fully developed alternatives were consistent with the purposes of the project. Plaintiffs have not responded to this argument.

NEPA requires an agency to consider a reasonable range of alternatives. See Prairie Woods Products v. Glickman, 971 F.Supp. 457, 471 (D. Oregon 1997). The range of alternatives is determined by the nature and scope of the project, but the range need not extend beyond alternatives reasonably related to the purposes of the project. The Alliance for Wild Rockies v. U.S.F.S., Civ. No. CV-95-0260-EJL, CV-95-0257-EJL (D.Idaho 1995), affirmed, 1996 U.S. App. Lexis 11591 (9th Cir. 1996)(citations omitted). An agency does not have to consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management area. Prairie Woods, 971 F.Supp. at 471.

The purposes of the Big Tower project are to: remove dead trees before insect levels reach epidemic proportions; eliminate excessive fuel loads; remove dead trees along roads that pose a hazard to the public; and revegetate slopes to provide stream shade and to protect slopes from erosion. (AR 1288-1291). Since salvage harvest is one of the goals of the EA, the Forest Service did not have to consider the restoration only alternative because it would not meet the stated purposes of the project. See City of Angoon v. Hodel, 803 F.2d 1016, 1020-1021 (9th Cir. 1986)(Corps did not have to examine an alternative in detail that would not satisfy the purposes for which a permit was sought), cert. denied, 484 U.S. 870 (1987).

NFMA

Federal defendants argue that the Forest Service complied with NFMA's diversity/viability and monitoring requirements and the Big Tower Project is consistent with the Forest Plan. Plaintiffs have not responded to these arguments.

Plaintiffs allege that the Forest service has failed to ensure the diversity and viability of fish and wildlife species, citing 36 C.F.R. §219.19. "[A] challenge to a Forest Service's district decision is not cognizable under 16 U.S.C. §1604(g) and 36 C.F.R. §219.19 . . . because only challenges to regional guides or forest plans may be brought under those provisions." Environment Now! V. Espy, 877 F.Supp. 1397, 1420 (E.D. Cal. 1994).

In their complaint, plaintiffs allege that the Forest Service has not conducted adequate or accurate monitoring of MIS which may be present and impacted by the Big Tower Project. Monitoring and reporting are not final agency actions subject to judicial review. Ecology Center, Inc. V. U.S. Forest service, CV 96-142-M-LBE (D.Mont. 1997).

In their complaint, plaintiffs allege that the Big Tower project is not consistent with the Umatilla Forest Plan, because it is located in a C-& Special Fish Management Area and it does not comply with Forest plan standards for PACFISH, shade, and soil productivity. Defendants have presented evidence that the Forest service determined that the Big Tower project would be consistent with the Forest Plan if certain amendments were made to the Forest Plan. (AR 1336). Those amendments were made. (AR 1565).

Defendants have presented evidence that PACFISH standards will be met. (AR 1828, 1828, 1846). Defendants have presented evidence that the Big tower EA contains numerous mitigation measures to ensure compliance with Forest Plan provisions. (AR 1309). Defendants have also presented evidence that salvage sales are consistent with the C-& designation. (Forest Plan 4-169). Defendants have presented evidence that no salvage harvesting will occur in RHCAs, and therefore, the Big Tower project will not affect streamside shade and will comply with Forest Plan standards. (AR 1561, 1322). Defendants have presented evidence that the harvest system selected and mitigation measures in the Big Tower project will ensure that Forest plan standards are met with regard to soil productivity. Plaintiffs do not address these arguments or dispute the evidence presented in their memorandum. It appears that the Big Tower project is consistent with the Forest Plan.

Issuance of a Permanent Injunction

In the Ninth Circuit, courts may apply one of two preliminary injunction tests. Ali v. United States, 932 F.Supp. 1206, 1209 (N.D.Cal. 1996). Under the first test, the party must show: 1) irreparable injury; 2) probability of success on the merits; 3) the balance of equities in their favor; and 4) if the public interest is involved, the granting of the injunction is in the public interest. Stanley v. University of Southern California, 13 F.3d 1313, 1319 (9th Cir. 1994)(citation omitted). Under the second test, the moving party must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardship tips sharply in their favor. Id. Even if the balance

tips in their favor, they must still show a fair chance of success on the merits. Id. If the balance tips sharply in favor of the plaintiff, less likelihood of success on the merits is required. Wilson v. Watt, 703 F.2d 395, 399 (9th Cir. 1983). In addition, the party must also show an inadequate remedy at law. Stanley, 13 F.3d at 1320. The standards for a permanent injunction are the same as a preliminary injunction, except the moving party must show actual success on the merits, instead of probable success on the merits. Amoco Production Co. V. Village of Gambell, AK, 480 U.S. 531, 546 n. 12 (1987).

"Irreparable harm is injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation." Tom Doherty Associates, Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 37 (2nd Cir. 1995). Injunctive relief is appropriate when the moving party demonstrates irreparable harm and inadequacy of legal remedies. Amoco Production Co., 480 U.S. at 542 (citation omitted). The "court must balance the competing claims of injury and must consider the effect on each party the granting or withholding of the requested relief. Id. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Id. at 545. The court will not issue an injunction if the granting of an injunction "might actually jeopardize natural resources". American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966 (9th Cir. 1983).

"The court must weigh and consider the public interest in deciding whether to issue an injunction". Seattle Audubon Soc. v. Evans, 771 F.Supp. 1081, 1095 (W.D. Wash.), affirmed, 952 F.2d 297 (9th Cir. 1991)(citations omitted). An administrative agency's failure to comply with the law "invokes a public interest of the highest order: the interest in having government officials act in accordance with the law. Id. at 1096 (citation omitted).

"In determining whether to issue an injunction where statutory violations have occurred, the court must engage in a two-part analysis." Id.(citation omitted). First, the court must determine whether the statute restricts the courts equity jurisdiction; whether the statue would either require or preclude the issuance of an injunction. Id. Second, if there is no limitation, the court must balance the equities to determine the appropriateness of an injunction. Id. If the court finds NEPA violations, an injunction is the appropriate remedy. See Forest Conservation Council v. U.S.F.S., 66 F.3d 1489, 1496 (9th Cir. 1995). However, an injunction should not automatically issue. Id. Instead, defendants should be given an opportunity "to present evidence of unusual circumstances that weigh against the injunction sought, and to present evidence to assist the court in fashioning the appropriate scope of whatever injunctive relief is granted." Id. (citations omitted).

Plaintiffs failed to establish actual success on the merits.

Based on the foregoing, the court denied plaintiffs' motion for summary judgment and for permanent injunction, granted plaintiffs' motion to file an overlength brief, and

granted defendants' motion for summary judgment and defendant-intervenors motions for summary judgment.

DATED this 24th day of August, 1998

/s/Ann Aiken
United States District Court Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

BLUE MOUNTAIN BIODIVERSITY PROJECT, et. al.,	)	Case No. CV 98-98-AA
Plaintiffs,	)	ORDER
v.	)	
JEFF BLACKWOOD, in his official capacity as Ssupervisor, Umatilla National Forest; and UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture,	)	[U.S. District Court of Oregon Filed July 24, 1998]
Defendants.	)	
and	)	
MALHEUR LUMBER COMPANY, et al.,	)	
Intervenors-Defendants.	)	

AIKEN, Judge

The court having reviewed the submissions by the parties, after conducting a hearing, and the court being fully advised of the matter, the court finds that the plaintiffs have failed to establish actual success on the merits. Therefore, the court hereby denies plaintiffs' motion for summary judgment and permanent injunction (doc #32) and grants plaintiffs' motion to file an over length brief (doc #33). The court hereby grants federal defendants' motion for summary judgment and grants intervenor/ defendants' motion for summary judgment (doc #46). Opinion to follow.

DATED this 24th day of July, 1998.

/s/ Ann Aiken
Ann Aiken
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BLUE MOUNTAIN BIODIVERSITY PROJECT, et al.,	)
Plaintiffs,	)
v.	) Civil No. 98-98-AA
JEFF BLACKWOOD, in his official capacity as Supervisor, Umatilla National Forest, et al.,	) ORDER
Defendants,	)
and	) [U.S. District Court of Oregon Filed Aug. 25, 1998]
MALHEUR LUMBER COMPANY, et al.	)
Intervenors-Defendants.	)

AIKEN, Judge:

Plaintiffs' motion for injunction pending appeal (doc. 61) is denied.

The standard to be applied here is the same for a preliminary injunction: whether plaintiffs have met their burden of demonstrating (1) likelihood of success on the merits of their appeal; (2) imminent threat of irreparable harm; (3) a favorable balance of harms; and (4) a public interest supporting the injunction. Northern Alaska Environmental Center v. Hodel, 803 F.2d 466, 471 (9th Cir. 1996); Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977) (motion for injunction pending appeal to be granted or denied under same standard as motions for preliminary injunction before a district court).

This court has already ruled on the merits of plaintiffs' case and found it did not have merit. See Order dated July 24, 1998 ("the court finds that the plaintiffs have failed to establish actual success on the merits"); and Opinion dated August 24, 1998.

Similarly, because this court found that plaintiffs' claims were without merit, plaintiffs have failed to show imminent harm, irreparable or otherwise, which could justify an injunction pending appeal.

Further, the balance tips in favor of denying the injunction. Plaintiffs have failed to introduce evidence of harm, or of irreparable harm. The federal defendants have introduced evidence of jeopardy to the reforestation effort because of the problems of obtaining an adequate source of seeds and seedlings, harm to the resource in the form of sedimentation and noxious weeds, economic harm to the purchaser as well as to the Forest Service, and a forestalling of the benefits of repair to a permanent road used by the Forest Service and the public.

Finally, the public interest in the Big Tower project favors denying the injunction. The Big Tower Project was intended to focus primarily on salvage in order to recover the most value from burned timber before deterioration greatly reduced timber quality; quick action is necessary to minimize loss. Administrative Record ("A.R.") 1291. Quick action is also important for the reforestation components of the Big Tower Project due to extensive loss of ground cover and lack of natural tree seed sources. A.R. 966, 1291, 2598-2604. See also, Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975) (public interest favored denying the injunction because removing diseased timber would prevent spread of insects, and "absent prompt removal, the timber will be worthless").

Plaintiffs' motion for stay pending appeal is denied.

DATED this 25th day of August 1998.

/s/ Ann Aiken
Ann Aiken
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLUE MOUNTAIN BIODIVERSITY, et al.	) No. 98-35783
	) DC# CV-98-98-ALA
Plaintiffs-Appellants,	) Oregon (Portland)
vs.	)
JEFF BLACKWOOD, et al.,	) ORDER
Defendants-Appellees	)[Ninth circuit Court of Appeals Filed Aug. 31, 1998]
MALHEUR LUMBER, et al.,	)
Intervenors-Defendants/Appellees.	)

Before: O'SCANNLAIN and RYMER,
Circuit Judges

Appellants seek emergency injunctive relief prohibiting logging, roadbuilding, or other ground-disturbing activities in the Dragon, Overlook, and Lone timber sales (the "Big Tower Salvage and Reclamation Project timber sales") on the Umatilla National Forest, pending the disposition of this appeal. Appellants' emergency motion for an injunction pending appeal is denied.

Appellants' motion to expedite briefing and calendaring of the appeal is granted in part.

If they have not done so already, the parties immediately shall arrange for expedited preparation by the district court reporter of all portions of the official transcript of oral proceedings in the district court which the parties wish to include in the record on appeal.

Appellants' opening brief and excerpts of record shall be filed in this court and served on opposing counsel by September 14, 1998; appellees' answering brief shall be filed in this court and served on opposing counsel by September 28, 1998; and appellants' optional reply brief shall be filed in this court and serve don opposing counsel within seven days after service of appellee's answering brief.

Due to the expedited nature of this appeal, no motions for extension of the time for filing the briefs will be filed or entertained.

The appeal shall be calendared for the week of November 2-6, 1998 in San Francisco.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLUE MOUNTAIN BIODIVERSITY, et al.	) No. 98-35783
	) DC# CV-98-98-AA
Plaintiffs-Appellants,	) Oregon (Portland)
vs.	)
JEFF BLACKWOOD, et al.,	) ORDER
Defendants-Appellees	)[Ninth Circuit Court of Appeals Filed Nov. 5, 1998]
MALHEUR LUMBER, et al.,	)
Intervenors-Defendants/Appellees.	)

Before: FLETCHER and TASHIMA,
Circuit Judges, and
FITZGERALD,[1] District Judge

During the pendency of this appeal, appellants requested immediate injunctive relief prohibiting logging, roadbuilding, and other ground disturbing activities related to the Dragon, Overlook, and Lone timber sales that comprise the Big Tower Salvage and Revegetation Project ("Big Tower Project") in the Umatilla National Forest in Oregon.

The court has reviewed the briefs and record and has heard argument. It concludes that it will reverse the district court and require the Forest Service to prepare an Environmental Impact Statement (EIS). Accordingly, we grant appellants' motion for an injunction pending appeal, Fed R. App. P. 8(a), to forthwith halt all logging, road building and other ground disturbing activities within the Tower Fire area of the Umatilla National Forest until further order of the court. An opinion will follow.

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1 Hon. James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLUE MOUNTAIN BIODIVERSITY, et al.	) No. 98-35783
	) D.C. No. CV-98-98-AA
Plaintiffs-Appellants,	) Oregon (Portland)
vs.	)
JEFF BLACKWOOD, et al.,	) ORDER OF CLARIFICATION
Defendants-Appellees	)[Ninth Circuit) Court of Appeals) Filed Nov. 10, 1998]
MALHEUR LUMBER, et al.,	)
Intervenors-Defendants/Appellees.	)

Before: FLETCHER and TASHIMA,
Circuit Judges, and
FITZGERALD,[1] District Judge

Defendants and intervenors request clarification of this Court's November 5, 1998 Order "halt[ing] all logging, roadbuilding, and other ground disturbing activities within the Tower fire area of the Umatilla National Forest until further order of this court." We clarify the Order to this extent: the Order does not prohibit road maintenance, water bar installation, ditch and culvert clearing, or other erosion-prevention measures "designed to put the roads to bed for the winter;" nor does the Order prohibit hunting or other recreational activities except in such areas and to such extent that the U.S. Forest Service determines, in its discretion, that defendants'-intervenors' logging activities have created erosion or erosion-inducing conditions that would be exacerbated by such activities.

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1 Hon. James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLUE MOUNTAIN BIODIVERSITY, et al.	) No. 98-35783)) D.C. No. CV-98-98-AA
Plaintiffs-Appellants,	)
vs.	)
JEFF BLACKWOOD, et al.,	) SECOND ORDER OF) CLARIFICATION
Defendants-Appellees	)[Ninth Circuit Court) of Appeals) Filed Dec. 3, 1998]
MALHEUR LUMBER, et al.,	)
Intervenors-Defendants/Appellees.	)

Before: FLETCHER and TASHIMA,
Circuit Judges, and
FITZGERALD,[1] District Judge

On November 27, 1998, Plaintiffs filed a "Notice to Court of Probable Violations of Court's Orders of November 5th and 10th, 1998, describing a disagreement over the scope of this Court's injunction issued November 5, 1998, as clarified on November 10, 1998. We treat the "Notice" as a motion for further clarification.

When defendants and intervenors requested clarification of this Court's November 5, 1998 Order "halt[ing] all logging, roadbuilding, and other ground disturbing activities within the Tower Fire Area of the Emptily National Forest until further order of this court," they expressly listed the activities, including the removal of logs already down," that they requested permission to continue. We clarified the November 5th order by stating that the Order did not prohibit erosion-prevention measures "designed to put the roads to bed for the winter," or recreational activities that would not exacerbate erosion. The Order of Clarification did not exclude hauling downed logs from the scope of the injunction. Hauling of downed logs is not permitted under the injunction.

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1 Hon. James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

NATIONAL ENVIRONMENTAL POLICY ACT

43 U.S.C. §§ 4331, 4332

Sec. 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may-

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

43 U.S.C. § 4332

Sec. 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall -

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State
agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement. The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in

restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

COUNCIL ON ENVIRONMENTAL QUALITY REGULATIONS

40 C.F.R. §§ 1501.4, 1508.9, 1508.25, 1508.27

Sec. 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in Sec. 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (Sec. 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by Sec. 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (Sec. 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (Sec. 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in Sec. 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under Sec. 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to Sec. 1507.3, or

(ii) The nature of the proposed action is one without precedent.

* * *

Sec. 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

* * *

Sec. 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs. 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

* * *

Sec. 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.